Supreme Court, U.S.
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No. 99-2089 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

ALAN M. HOWARD, R. BORIS GREENBERG, KATHRYN PARAVENTI, and MERHDAD ETEMAD, on behalf of themselves, and on behalf of all others similarly situated,

Petitioners,

vs.

AMERICA ONLINE, INC., JAMES V. KIMSEY, STEPHEN M. CASE, and LENNERT J. LEADER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX D –ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH PREJUDICE FILED MAY 14, 1998, AND ENTERED MAY 19, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 97-1642-AAH

ALAN M. HOWARD, et al.,

Plaintiffs,

v.

AMERICA ONLINE, INC., et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH PREJUDICE

I. INTRODUCTION

Plaintiffs filed their original Complaint on March 13, 1997. On September 22, 1997, following full briefing and hearing, the Court granted Defendants' motion to dismiss the Complaint, with leave to amend. Plaintiffs filed their First Amended Complaint on October 23, 1997. On January 26, again following full briefing and hearing, the Court granted Defendants' motion to dismiss the First Amended Complaint without leave to amend. At that time, the Court partially explained the basis for its decision. The Court now sets forth in full its findings of fact and conclusions of law.

II. BACKGROUND

Plaintiffs are four subscribers to AOL who have used its services in both their personal and professional capacities. Plaintiffs purport to bring this lawsuit on behalf of millions of subscribers of AOL injured by the Defendants' actions.

Defendant America On-Line provides interactive computer services to its subscribers, including access to the Internet and the World Wide Web, email, online conferencing, online information directories, entertainment, software, and extensive "newsstand" of electronic magazines and newspapers, and a broad array of original programming and content.

Defendant James V. Kimsey is a co-founder, Chairman Emeritus, and a member of the Board of Directors of AOL. Defendant Stephen M. Case is a

co-founder, President, Chief Executive Officer, Director and Chairman of the Board of AOL. Defendant Lennert J. Leader is Senior Vice President, Chief Financial Officer, and a member of the Board of Directors of AOL. Plaintiffs assert that Defendants Kimsey, Case and Leader were at all relevant times the persons responsible for the management and control of defendant AOL, and for implementing and conducting the pattern of activity complained of.

Plaintiffs' First Amended Complaint challenges four categories of alleged fraudulent conduct. fraudulent billing practices and other fraudulent treatment of AOL's customers; securities fraud; fraudulent dealings with AOL's packaging supplier; and the fraudulent introduction of AOL's flat-fee pricing program. Plaintiffs also allege that AOL is a "common carrier" as defined in the Federal Communications Act. Finally, Plaintiffs set forth an array of purported privacy and intellectual property concerns.

The First Amended Complaint, filed October 22, 1997, states the following nine causes of action:

1. Violation of § 1962(c) of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (RICO) by the individual Defendants; and Conspiracy to violate RICO by the individual defendants, in violation of U.S.C. § 1962(d)

2. Violation of § 1962(c) of RICO by all Defendants; and Conspiracy to violate RICO by all Defendants, in violation of U. S.C. § 1962(d)

3. Violation of the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, against Defendant AOL

4. False Advertising in violation of Cal. Bus. & Prof. Code §§ 17500 *et seq.*, against all Defendants

5. Fraud and Deceit, against all Defendants

6. Negligence, against all Defendants

7. Unfair Business Practices in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*, against all Defendants

8. Declaratory and Injunctive Relief, against all Defendants

9. Declaratory and Injunctive Relief, against all Defendants

III. DISCUSSION

All Defendants have brought a motion to dismiss under Fed.R.Civ.P. 12(b)(6). A complaint should only be dismissed for failure to state a cause of action when "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). All

allegations in the complaint should be construed in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S Ct. 1683, 1686, 40 L.Ed.2d 90.

In other words, a motion to dismiss should be granted only when there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Because Plaintiffs fail to allege sufficient facts to establish liability under any of their federal claims, the Amended Complaint must be dismissed.

A. Plaintiffs' First and Second Causes of Action Fail to State a Claim Under Any Section of RICO

Plaintiffs' first cause of action charges three of AOL's officers with conducting AOL's affairs through a pattern of racketeering activity, in violation of § 1962(c) of the Racketeering Influenced and Corrupt Organizations Act, Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968. The second cause of action alleges violation of RICO by the corporation as well as the individual officers. Both causes of action also state conspiracy claims under § 1962(d) of RICO against the respective defendants named in the two counts.

Plaintiffs' First Amended Complaint alleges that the Defendants violated RICO by engaging in four categories of allegedly fraudulent conduct: (1) manipulating AOL's billing practices and charging subscribers excessive fees; (2) artificially inflating the

value of the company's stock so that AOL's officers could sell it at overvalued prices; (3) engaging in fraudulent dealings with AOL's packaging supplier, PTP Industries, Inc.; and (4) fraudulently advertising AOL's flat-fee pricing plan in order to increase subscribership beyond the company's ability to provide Internet access to its subscribers;

The RICO statute provides, at 18 U.S.C. § 1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Liability under § 1962(c) is therefore established by showing the following four factors: (1) the conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. *Sedima, S.P.RL. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985).

Defendants argue that Plaintiffs' RICO claims are fatally deficient for four reasons: (1) plaintiff's second claim fails to allege a proper RICO "enterprise;" (2) Plaintiffs' allegations fail to establish a "pattern" of racketeering activity; and (3) Plaintiffs fail to allege predicate acts of racketeering with the specificity required by Rule 9(b) of the Federal Rules of Civil

Procedure; (4) Plaintiffs fail to properly allege a conspiracy under RICO.

Because the Court finds that Plaintiffs' RICO claims are in fact deficient for the second, third and fourth reasons set forth by Defendants, Plaintiffs' first and second causes of action must be dismissed.

1. Plaintiffs' allegations meet RICO's "enterprise" requirement.

To assert a claim under RICO, a plaintiff must allege that the defendant has directly or indirectly conducted or participated in the conduct of the affairs of an "enterprise" through a pattern of racketeering activity. 18 U.S.C. § 1962(c). The statute defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

Plaintiffs' first cause of action alleges violation of RICO against the individual defendants. The second cause of action alleges a RICO claim against all individual defendants and against AOL as a corporation. Plaintiffs allege that the individual defendants, and AOL by the acts of the defendants as corporate officers, exercised control of an enterprise, AOL itself, through a pattern of racketeering activity.

Defendants do not challenge the "enterprise" element in Plaintiffs' first cause of action, but assert that the only "enterprise" described in Plaintiffs' second cause of action, brought against the corporation, is an

ever-changing mix of computer designers, operators and subscribers associated with AOL. A RICO enterprise must exhibit "some sort of structure . . . for the making of decisions ...." *Chang v. Chen*, 80 F.3d 1293, 1299 (9th Cir. 1996) (citations omitted).

However, sufficient structure exists if the associational ties of those charged with a RICO violation amount to an organizational pattern or system of authority. *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988). Plaintiffs allege that AOL had such a leadership structure, led by the three corporate defendants who were able to make corporate decisions. The "enterprise" element of RICO liability is therefore met.

2. Plaintiffs fail to establish a pattern of racketeering activity under RICO.

The RICO statute imposes civil and criminal liability on a defendant who has engaged in a "pattern" of "racketeering activity." 18 U.S.C. § 1962(c). The definitions of both terms are essential to the Court's attempt to determine whether Plaintiffs have set forth allegations showing a RICO violation.

"Racketeering activity" is defined in § 1962(1) as any "predicate act" indictable under several provisions of Title 18 of the United States Code, including mail fraud, 18 U. S.C. § 1341, and wire fraud, 18 U.S.C. § 1343.

The statute does not specifically define the term "pattern," except to state that a pattern "requires at

least two acts of racketeering" within a ten year period. 18 U.S.C. § 1961(5). The Supreme Court has determined, however, that this "two-act" requirement states only the bare numerical minimum, rejecting the suggestion that a pattern is established "merely by proving two predicate acts." *H. J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 236-37, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Relying on the legislative history of RICO,[1] the Court reasoned that "there is something to a RICO pattern beyond simply the number of predicate acts involved." *Id.* at 238.

A RICO pattern is shown only when a plaintiff demonstrates that (1) the predicate acts are related, and (2) that the acts "amount to, or threaten the likelihood of, continued criminal activity." *Id.* at 239.

As the Court noted, "the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." *Id.* at 243. Instead, the Court reasoned that Congress "had a fairly flexible concept of pattern in mind." *Id.* at 239.

The first requirement of a RICO pattern, "relatedness," is met when the allegedly criminal conduct "embraces criminal acts that have the same or similar purposes, results, participants, victims, or

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[1] The principal sponsor of the Senate bill indicated that "proof of two acts of racketeering, without more, does not establish a pattern." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See *H.J, Inc.*, 492 U.S. at 238.

methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240 (applying the statutory definition of "pattern" from Title X of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, of which RICO formed Title IX).

The second requirement, that the plaintiff show that there is "continuity" in the defendant's acts, is more difficult to apply. The Supreme Court explained that "continuity is both a closed-ended and open-ended concept, referring either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241.

Establishing continuity over a "closed" period requires that the defendant engage in "a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *Id.* at 242 (emphasis added).

Open-ended continuity, on the other hand, is established when the predicate acts "include a specific threat of repetition extending indefinitely into the future," or when the offenses are sufficiently prevalent as to constitute an entity's "regular way of doing business." *Id.*

With these principles in mind, the court must decide whether each of the acts allegedly committed by AOL constitutes a "predicate act" under RICO. Then

the court must decide whether those acts which are properly considered predicate acts are sufficiently related; and if, when considered together, they sufficiently demonstrate either the closed or open-ended continuity necessary to establish a "pattern" of racketeering activity.

For the reasons set out below, the Court finds that such a pattern is not established. Most of the alleged misconduct is not actionable because the claims have already been settled (the fraudulent billing claims); the activity has been deleted from RICO (securities fraud); or the conduct did not injure Plaintiffs and is unrelated to the other allegations (securities fraud and fraudulent dealings with AOL's packaging supplier). The only remaining conduct (the advertising of the flat fee program) did not last long enough to form a "pattern" under RICO.

Plaintiffs essentially attempt to link every "bad act" alleged against AOL over the last several years, and argue that together they constitute a pattern of racketeering activity. If Plaintiffs' position correctly stated the law under RICO, every state law fraud claim against a major corporation would be transformed into the latest episode in a continuous "pattern" of racketeering activity. Since Plaintiffs' allegations do not meet the "relatedness" and "continuity," tests required to establish a pattern under RICO, these claims must be dismissed.

a) Plaintiffs' use of allegations of billing fraud before the flat-fee program to establish a pattern under RICO is barred by a previous settlement.

Plaintiffs' First Amended Complaint alleges that the Defendants engaged in a variety of fraudulent billing practices previous to the adoption of AOL's flat-fee program, including false calculation of subscribers' online time by rounding up of billing increments (First Amended Complaint, ¶¶ 56-65); improper accounting practices (¶¶ 74-80); fraudulent billing for time spent in "free" areas (¶¶ 101-105); fraudulently delaying account cancellations (¶¶ 106-110); unauthorized checking account withdrawals (¶¶ 111-114); and deceptive billing practices involving "free trial period" programs (¶¶ 115-121). Plaintiffs allege that these actions began in 1992 and continued into 1996. Plaintiffs assert that both mail and wires were used to accomplish these actions, thereby making them predicate acts of racketeering activity.

Allegations concerning these billing practices have already been litigated and settled in a previous class-action suit, *Hagen v. America Online, Inc.*, San Francisco Superior Court Case No. 971047 (See First Amended Complaint in Hagen, Exhibit 5 of Defendant's Request for Judicial Notice).[2]

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[2] When considering a motion to dismiss brought under Rule 12(b)(6), a court may take judicial notice of matters of public record such as pleadings, orders and other papers on file in

The Complaint in Hagen sought relief from AOL for inadequate disclosures regarding connection and disconnection time; rounding up of billing increments; misleading advertising of AOL's hourly rate; unfair calculation of service charges on a per-minute basis; improper charging for downloading, delays in connection time, and time spent in "free areas;" failure to refund charges upon cancellation; and unauthorized withdrawals from subscribers' checking accounts (First Amended Complaint, Exhibit 5 of Defendants' Request for Judicial Notice, p. 2-3).

The Settlement Class in Hagen included "all persons in the United States who at any time during the Class Period were Subscribers of America Online Services." (Stipulation of Settlement, Exhibit 1 of Defendants' Request for Judicial Notice, p. 8). The Class Period was defined as the period between July 14, 1991 and March 31, 1996. (Stipulation of Settlement, p. 7).

The court's Final Judgment in the Hagen case, filed March 16, 1997 enforcing the terms of the Settlement Stipulation, bars the Settlement Class

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another case. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986). The court therefore fakes judicial notice of the following documents submitted by Defendants with their Request for Judicial Notice: (1) Stipulation of Settlement in Hagen v. America Online, attached as Exhibit 1; (2) : Final Judgment and Order of Dismissal, attached as Exhibit 2; (3) Statement of Decision Approving Fairness and Adequacy of Settlement, attached as Exhibit 3; (4) Notice of Entry of Statement of Decision Approving Fairness and Adequacy of Settlement, attached as Exhibit 4; and (5) First Amended Complaint, attached as Exhibit 5.

Members[3] from relitigating the issues settled there, including all claims that were alleged in the Complaint, "or which could or might have been alleged in the Amended Complaint and arise out of or are related to the matters referred to in the Amended Complaint." (Final Judgment and Order of Dismissal, Exhibit 2 of Defendant's Request for Judicial Notice). Since the allegations of billing fraud set out in the current Plaintiffs' Amended Complaint mirror the allegations settled in *Hagen*, they come within the scope of *Hagen's* settlement and are barred.[4]

Plaintiffs attempt to defeat the preclusive effect of the *Hagen* settlement by arguing that the allegations forming the basis of the claims in *Hagen* in may be included as evidence of a larger pattern of racketeering activity for purposes of establishing liability under RICO. This argument fails, however, because a release, which is governed by the same principles as other contractual agreements, bars all claims arising out of the same incident, against all tortfeasors. *General Motors Corp. v. Superior Court*, 12 Cal.App.4th 435, 439, 15 Cal.Rptr. 622, 625 (1993). See also *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992)

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[3] Plaintiffs clearly fall within the Settlement Class, since they claim to have been AOL subscribers between 1992 and March, 1996. Plaintiffs have not presented any argument to the contrary; nor do they claim to have opted out of the *Hagen* Settlement Class.

[4] This court is required to give preclusive effect to the state court judgment in Hagen, pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, even though the case was resolved by settlement. *Matsushita Electronic Industrial Co. v. Epstein*, — U.S. —, 116 S.Ct. 873, 874, 134 L.Ed.2d 6 (1996).

(settlement release barred "not only those claims alleged in the complaint, but also a claim 'based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have even presentable in the class action'"), *cert. denied* 506 U.S. 953 (1992), *quoting TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (4th Cir. 1982).

This principle of preclusion is specifically applicable in the RICO context. A plaintiff is barred from using allegations underlying previously litigated claims to support a subsequent RICO claim. *Mortel v. Mortel Co.*, 887 F.2d 1322, 1325-26 (7th Cir. 1989) (holding that a shareholder who brought a state court breach of contract suit was barred by res judicata from bringing a subsequent federal RICO action, where the alleged predicate acts concerned the same transaction or series of facts).

Plaintiffs' attempt to repackage the claims asserted and settled in *Hagen* as predicate acts under RICO is therefore barred. The billing fraud allegations set out in the Complaint may not be considered as evidence of a pattern of racketeering activity.

b) Acts of securities fraud are no longer "predicate acts" under RICO.

Plaintiffs allege in Paragraphs 66-73 and 89-95 of the First Amended Complaint that the individual Defendants engaged in various acts of securities fraud. Specifically, Plaintiffs allege that the Defendants

misrepresented the company's revenues, profits, and subscribership numbers to the public and AOL's shareholders, in order to artificially inflate AOL's stock price. The Defendants also allegedly utilized improper accounting practices, such as listing advertising expenses as amortizable assets rather than costs in public financial reports, in order to present a false picture of the company's profitability and further boost the stock price. The Defendants, insiders at AOL, then illegally sold their individual stock for huge profits. Plaintiffs contend that these actions, occurring between 1992 and 1996, constitute a part of the widespread pattern of racketeering activity alleged throughout the Complaint.

The RICO statute originally included securities fraud among its list of predicate acts. 18 U.S.C. § 1961(1)(D) (1984 ed.). However, Congress amended RICO in 1995, through the Private Securities Litigation Reform Act, 18 U.S.C. § 1964(c) (1997 Supp.), to eliminate securities fraud as a predicate act for RICO claims, stating that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962." *See Rowe v. Marietta Corp.*, 955 F.Supp. 836 (W.D. Tenn. 1997) (dismissing RICO claim based on securities fraud); *Reading Wireless Cable Television Partnership v. Steingold*, 1996 WL 741432 (D. Nev. 1996) (same).

The Plaintiffs also attempt to package the Defendants' alleged stock-dumping practices as mail and wire fraud, which qualify as predicate acts of racketeering. See 18 U.S.C. § 1962(1). However, the

statute bars the consideration of conduct that "would have been actionable" as securities fraud. 18 U C. § 1964(c) (emphasis added). *See Krear v. Malek*, 961 F.Supp. 1065, 1974 (E.D. Mich 1997) ("Congress intended that conduct constituting wire and mail fraud not form the basis of a predicate act under the amendment if such conduct would also be actionable as securities fraud.") (emphasis added). The acts described by Plaintiff would be actionable, if at all, as securities fraud, and therefore cannot be considered as part of any RICO "pattern."

Additionally, the acts described fail the Supreme Court's test for "relatedness." The acts only relate to the other proposed predicate acts in the sense that they were all allegedly intended to enrich the Defendants. They did not have similar results, victims, or methods of commission. *See H. J.., Inc.*, 492 U.S. at 240. *See also Ticor Title Insurance Co. v. Florida*, 937 F.2d 447, 450 (9~ Cir. 1991) (to satisfy the relationship requirement, plaintiff must "show[] that the racketeering predicates 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'"). Most importantly for the question of "relatedness," the acts of securities fraud were allegedly perpetrated against shareholders, while Plaintiff's allegations of billing fraud claim injury to subscribers. Even if Defendants were somehow able to circumvent the recent RICO amendment discussed above, these unrelated allegations cannot be combined with Plaintiffs' other allegations to establish a pattern under RICO.

c) Allegations concerning AOL's packaging supplier. PTP Industries, are unrelated to Plaintiffs' other claims and are not part of a "pattern" of activity under RICO.

In Paragraphs 122-127 of the First Amended Complaint, the plaintiffs describe what they allege to be various fraudulent practices inflicted upon PTP Industries, Inc., a packaging and shipping company used by AOL. Plaintiffs allege that PTP was induced to dramatically expand its operations based on misrepresentations concerning AOL's shipping and packaging needs. Then, in 1996, Defendants slashed the volume of purchases from PTP when, according to Plaintiffs, AOL was financially unable to meet its forecasted product orders. AOL also switched from the packaging PTP had been supplying to an alternate packaging system, forcing PTP to close facilities in Nebraska and Texas.

Plaintiffs again attempt to argue that this conduct shows that fraudulent activity has been AOL's modus operandi over an extended period of time, manifested in a variety of ways. However, the plaintiffs do not explain what connection these acts have to the alleged pattern set out in the rest of the Complaint. These allegations fail the "relatedness" test set out in *H.J. Inc.*, and therefore cannot be used to help establish a "pattern" of RICO activity.

Nor do Plaintiffs explain how the Defendants' acts had any effect on the Plaintiffs. They therefore lack

standing to assert these claims. *See Sedima, S.P.RL. v. Imrex Co.*, 473 U.S. 479, 496-97, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985) (plaintiff only has standing under RICO to the extent that he has been injured by the conduct constituting the violation).

d) Alleged fraud regarding AOL's "flat-fee" program was not continuous enough to form a "pattern" of racketeering activity under RICO.

The only allegations remaining in Plaintiffs' Complaint describe a "flurry" of advertising for AOL's "flat fee" program. Plaintiffs allege in Paragraphs 128-153 of the Complaint that from October 1996 to February 1997, Defendants advertised through the mail on television, in magazines, and online, that customers could purchase "unlimited" access to AOL for a flat $19.95 monthly payment. According to Plaintiffs, AOL initiated this program with full knowledge that it did not have the ability to service all the customers who would pay the flat fee. Plaintiffs argue that each mailing and use of the wires constituted an act of mail or wire fraud, and that taken together, the acts constitute a "pattern" of racketeering activity. As described below (see Section A(3)), Plaintiffs have not set forth these allegations with the level of specificity required by Fed R. Civ.P. 9(b). However, even if the Court were to assume that the predicate acts had been set forth with sufficient particularity, Plaintiffs' claims would fail because their allegations fail to show that the predicate acts demonstrate closed-ended or

open-ended continuity, and therefore fail to demonstrate the required "pattern."

(i) Plaintiffs have not established sufficient closed-ended continuity to establish a pattern under RICO.

A pattern of racketeering activity demonstrated by showing closed-ended continuity requires "a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 429 U.S. at 242. The allegations set forth in this portion of the Complaint describe a scheme that lasted only four or five months, an insufficient period of time to establish a "pattern."

According to the Supreme Court, "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement." *H.J., Inc.*, 494 U.S. at 242 (emphasis added). The Ninth Circuit has held that "[a] pattern of activity lasting only a few months does not reflect the 'long term criminal conduct' to which RICO was intended to apply." *Religious Technology Center v. Wollersheim*, 971 F.2d 364, 367 (9th Cir. 1992) (holding that blackmail scheme lasting six months was insufficient to establish pattern).[5]

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[5] See also cases cited in *Wollersheim: Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 45-46 (1st Cir. 1991) (span of 34 months, absent threat of future criminal activity, is too short to support RICO claim); *Kehr Packages, Inc. v. Fidelcor, Inc.* 926 F.2d 1406, 1418 (3d Cir. 1991) (fraudulent scheme lasting 8 months did not

In fact, the Ninth Circuit has observed that "[w]e have found no case in which a court has held the [continuity] requirement to be satisfied by a pattern of activity lasting less than a year." *Wollersheim*, 971 F.2d at 366-67. Although the Ninth Circuit later cautioned in *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995) that a "bright line, one-year rule" is not consistent with the principle of flexibility enunciated by the Supreme Court, *id.* at 1528, the result in *Allwaste* did nothing to discredit the court's earlier observation. Only when the plaintiff asserted at a hearing on the defendant's motion to dismiss that it could show that the predicate acts occurred over a thirteen-month period did the court hold that he might be able to establish closed-ended continuity. *Id.*

While Plaintiffs allege that AOL committed numerous predicate acts between October 1996 and February 1997, by blitzing every major market in the United States with advertisements for the flat-fee program, the cases make clear that mere numbers are insufficient to establish a pattern under RICO. The predicate acts must occur over "a substantial period of time." *H. J. Inc.*, 429 U.S. at 242. Since AOL's flat-fee advertising campaign, lasting at most five months, cannot be considered "long-term" conduct, the court cannot find that these allegations establish closed-ended continuity.

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meet continuity test); *Parcoil Corp. v. Nowsco Well Serv., Ltd.*, 887 F.2d 502, 504 (4th Cir. 1989) (four months is insufficient to make out continuity); *Sutherland v. O'Malley*, 882 F.2d 1196, 1205 (7th Cir. 1989) (five month period is insufficient).

(ii) Plaintiffs have not established sufficient open-ended continuity to establish a pattern under RICO.

Plaintiffs are also unable to establish open-ended continuity, which requires a showing that the predicate acts "include a specific threat of repetition extending indefinitely into the future," or that "the offenses are sufficiently prevalent as to constitute an entity's "regular way of doing business." *H.J. Inc.*, 429 U. S. at 242. Plaintiffs allege that the Defendants' have conducted, and will continue to conduct, a practice of boosting subscribership far beyond the level at which it can provide the services promised. Plaintiffs assert that the Defendants make very little profit on subscribership fees, but receive substantial profit from advertising fees, which are generated by showing a large subscribership. They therefore argue that Defendants have promised, and will continue to promise, services they cannot deliver, in order to attract investment capital and advertising fees. While this analysis of AOL's profit structure may, if accurate, support an inference that Defendants will continue to seek a large subscribership, it does not establish the threat that AOL will use illegal means to meet this goal.

As recent Ninth Circuit cases on the question of "open-ended" continuity show, the fact that a defendant has allegedly committed acts of racketeering in the past is insufficient to warrant the conclusion that future conduct is threatened. Instead, the cases have hinged largely on the question of whether the pattern

of activity complained of was incomplete, so that the defendant could be expected to make further attempts to complete the scheme. The cases show that the duration of the alleged action is also critical, as with consideration of closed-ended continuity.

In *Schreiber Distrib Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393 (9th Cir. 1986), the court found that two predicate acts, furthering the diversion of a single shipment of goods, did not pose a threat of continuing activity because they occurred at nearly the same time, and because once those acts were complete, the defendant had no further need to commit predicate acts.

In *Sun Savings and Loan Ass'n v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987), the president of a bank had received kickbacks from the bank's customers and deposited them into a fictitious account over a thirteen-month period. The plaintiff's RICO claim was based on four acts of mail fraud; the Defendant had allegedly sent letters to several government agencies attempting to conceal his wrongdoing. The Ninth Circuit reversed the district court's dismissal on the ground that these acts of mail fraud "covered up a whole series of alleged kickbacks and receipts of favors, occurred over several months, and in no way completed the criminal scheme." *Id.* at 194.

In *Ikuno v. Yip*, 912 F.2d 306 (9th Cir. 1990) the court found open-ended continuity existed based on two filings of false annual reports for a phantom commodity trading company, since "there [was] no evidence that [the defendant] would have stopped

[filing false annual reports] if [the company] had not ceased to do business." *Id.* at 309.

In *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995) the court reasoned that the defendants' conduct presented a threat of future wrongdoing because the defendants, like the defendant in *Sun Savings and Loan*, had been involved in several kickback schemes lasting as long as thirteen months, and they "were not connected to the consummation of any particular transaction." The court determined that the defendants would likely have continued their actions if not for the fact that the Plaintiff intervened. *Id.* at 1529.

Plaintiffs' Complaint does not describe the type of scheme found to indicate a threat of future conduct in these cases. The Defendants' conduct lasted, at most, four or five months. There is no direct allegation that the Defendants had planned or threatened to continue the activity beyond February 1997, the date of the last alleged predicate act. There is no allegation, for example, that a fraudulent advertising blitz was to occur on an annual basis, like the false annual reports filed in *Ikuno*.

Nor do Plaintiffs' claims present indirect evidence from which the threat of continued activity can be inferred. The allegations concerning the flat-fee program do not describe several fraudulent schemes, as in *Allwaste* and *Sun Savings and Loan*. Although Plaintiffs claim that the Defendants promoted their "flat-fee" scheme by committing numerous acts of mail and wire fraud, these numerous individual acts essentially arose from the single decision to implement

and promote the new fee arrangement. The sheer numerosity of the acts arising from that decision is more a reflection of the size of the Defendant and the scope of its potential subscribership base, than an indication of a sustained series of decisions which would demonstrate that fraudulent activity is the company's regular way of doing business.

While a single racketeering episode may be sufficient to establish a "pattern" under RICO, *see Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), the number of separate attempts to defraud is a significant factor for the court to consider. *See Durning v. Citibank, Int'l*, 990 F.2d 1133, 1139 (9th Cir. 1993) (affirming dismissal of RICO claim and holding that RICO pattern not alleged where Defendants' "numerous related predicate acts" arose "from a single fraudulent event: the distribution of the misleading Official Statement;" finding of "isolated activity rather than an ongoing scheme which amounts to, or poses a threat of 'continued criminal activity'" not deterred by fact that case "involve[d] more than one victim of the alleged fraud."); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1533 (9th Cir. 1992) (affirming dismissal of § 1962(b) and (c) claims because "pattern" insufficient where employer's alleged retaliation for employee's articles and testimony amounted to "a single episode having the singular purpose of impoverishing [plaintiff]."); *Medallion Television Enterprises v. SelecTV of California, Inc.*, 833 F.2d 1360, 1365 (9th Cir. 1987) (continuity absent where case involved an "isolated, allegedly fraudulent inducement of [plaintiff] to enter the joint venture").

When only a single episode is alleged, it is reasonable to require that the episode must continue for a significant length of time. Continuity is, in either a closed-ended or open-ended inquiry, "centrally a temporal concept . . . ." *H.J., Inc.*, 492 U.S. at 242. Since Plaintiffs' allegations, when reduced to those acts properly considered "predicate acts," allege only a single episode of four or five months, providing no indication of a threat of continued activity, open-ended continuity is not shown. Plaintiffs therefore fail to establish a pattern of racketeering activity, and their RICO claims must be dismissed.

3. Plaintiffs have not stated RICO allegations with sufficient particularity.

Plaintiffs predicate their RICO claim mainly on allegations of mail fraud and wire fraud, which qualify as predicate acts of racketeering activity. 18 U.S.C. § 1962(1). Since the wire fraud statute, 18 U.S.C. § 1341, and mail fraud statute, 18 U.S.C. § 1343, have substantially the same language, the same analysis applies to each. *United States v. Berg*, F.Supp. 438, 440 (E.D.N.Y. 1989), citing *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316 (1987). The mail fraud statute, 18 U.S.C. § 1341, imposes criminal liability upon anyone who devises "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises," and uses the United States mails "for the purpose of executing such scheme or artifice or attempting so to do."

As the basis of their fraud claims, Plaintiffs allege that beginning in October, 1996, and continuing through February 1997, AOL launched an advertising blitz promoting its Flat Fee Program. AOL affirmatively represented that it had the infrastructure, modems, central computers and personnel to successfully provide unlimited online access to the AOL Enterprise and the Internet for its projected base of 8-10 million subscribers.

This advertising campaign was implemented through the following acts: AOL software disks and accompanying literature promising ease and unlimited AOL and Internet access were sent to millions of potential subscribers in a series of unsolicited interstate mailings and solicitations; on-line advertising was used to inform current subscribers of the Flat Fee Program, as well as to recruit new subscribers throughout the world through the Internet; existing subscriber arrangements were defaulted from $9.95 to $19.95 per month; and a national advertising campaign was instituted on radio, television and in the printed media.

AOL required subscribers to pay for the services offered and received either by giving AOL credit card information and authorization online or by authorizing AOL to debit a designated checking account, such authorization also being accomplished online. In both of these cases, interstate wire communication was utilized.

Plaintiffs allege that this activity was part of a scheme to defraud the public. Plaintiffs claim that Defendants knew they lacked the capacity to fulfill the

promises made in the letters and advertisements, but made promises in order to achieve a huge increase in AOL's membership. Defendants allegedly needed the increased membership in order to attract investment capital and advertising fees, and to boost AOL's stock value so that the individual defendants could sell their stock for substantial gains.

Plaintiffs further allege that because of the massive increase in AOL subscribers (in December 1996 alone, AOL online sessions increased from 6.2 million to 9.2 million daily), subscribers had slower connections to the Internet, busy signals, and were frequently unable to access the Internet. They claim that aside from being defrauded out of Internet access, many online businesses were defrauded out of profits when customers were unable to access their Internet sites. Plaintiffs also allege that such practices will continue in the future if Defendant is allowed to realize a profit from such activity.

According to Fed.R.Civ.P. Rule 9(b), "circumstances constituting fraud shall be stated with particularity." This rule is applicable to RICO claims, especially when mail fraud and wire fraud form the basis of a RICO claim. *See Alan Neuman Productions, Inc. v Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988).

In the Ninth Circuit, "a pleading is sufficient for purposes of Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer." *Zatkin v. Primuth*, 551 F.Supp. 39, 42 (S.D. Cal. 1982). Generally, the time, place and manner of each act of fraud must be alleged. *Bosse v. Crowell*

Collier & McMillan, 565 F.2d 602, 611 (9th Cir. 1977); *Lancaster Community Hospital v Antelope Valley Hospital District*, 940 F.2d 397, 405 (9th Cir. 1991).

Plaintiffs' allegations do not state claims for fraud with the requisite particularity. Statements such as "During the Fall of 1996," "in and around December, 1996," "on and aRer December 1, 1996," "during the months of December, 1996 and January, 1997" and "AOL continued advertising do not suffice. *See U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F.Supp. 1053, 1061 (N.D.Cal. 1991) ("Allegations such as '[d]uring the course of discussions in 1986 or 1987,' 'in or about May through December 1987,' and 'May 1987 and thereafter' do not make the grade.") (citation omitted).

Moreover, Plaintiffs do not attribute any allegedly fraudulent activity to any particular Defendants. This sort of "broad brush" pleading falls well short of the particularity required by Rule 9(b).

4. Plaintiffs' First and Second Causes of Action fail to state a RICO Conspiracy

In Plaintiffs' first and second causes of action, they allege that each defendant committed predicate acts of fraud in violation of RICO, and that each defendant conspired with each other defendant to conduct the enterprise through the commission of the predicate acts.

To state a conspiracy claim under RICO, a plaintiff must allege: (1) an agreement to conduct or participate in the affairs of an enterprise; (2) an

awareness of the essential nature and scope of the enterprise; and (3) an intent to participate in the RICO conspiracy. *Salinas v. United States*, ___ U.S. ___, 118 S.Ct. 469 (December 2, 1997); *Baumer v. Pachl*, 8 F.3d 1342, 1346 (9th Cir. 1993).

Plaintiffs' conspiracy claims contain none of these elements. Plaintiffs' conspiracy claims are merely conclusory allegations that each individual defendant and AOL "conspired with [the other] to violate 18 U.S.C. § 1962(c), in violation of 18 U.S.C. § 1962(d)." Plaintiffs do not allege that any defendants agreed to fulfill any particular role within a RICO enterprise, agreed to commit RICO predicate acts, or was aware of and intended to participate in a conspiracy.

Additionally, if a Plaintiff fails to establish the substantive elements of a RICO claim, a conspiracy claim cannot stand on its own. *See Religious Technology Center v. Wollersheim*, 971 F.2d 364 (9th Cir. 1992). A plaintiff's conspiracy claims under § 1962(d) also "stand or fall depending upon their claims under [§ 1962] (a) or (c)." *Gilbert v. Prudential-Bache Securities, Inc.*, 643 F.Supp. 107, 110 (E.D.Pa. 1986); *accord Eastern Corporate Federal Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F. Supp. 1532, 1537 (D. Mass. 1986). Since Plaintiffs' claims under the substantive provisions of RICO fail to state a claim, Plaintiffs' conspiracy claims fail as well.

B. Plaintiffs' Third Cause of Action fails because AOL Ts Not Classified as a Common Carrier Under the Communications Act

Plaintiffs' third cause of action charges Defendant AOL with violation of the Communications Act of 1934, 47 U. S.C. §§ 151 et seq. Plaintiffs claim AOL has violated the Act by (1) promulgating unjust or unreasonable charges, practices, classifications, or regulations in violation of 47 U.S.C. § 201(b), relating to services and charges; (2) giving unreasonable preferences or advantages to a particular person, class or persons or locality, thereby subjecting a particular person, class of persons or locality to unreasonable prejudice or disadvantage in violation of 47 U.S.C. § 202(b), relating to discrimination and preferences; and (3) failing to sufficiently protect subscriber privacy as required by the notice provisions of the Cable Communications Privacy Act, 47 U. S.C. § 551, relating to the protection of subscriber privacy.

These charges depend on the claim that defendant AOL is a "common carrier" as defined in the Communications Act, and is therefore subject to the Act's regulations. The Communications Act defines a "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h).

1. Courts have not classified Internet Service Providers as common carriers.

The Supreme Court has defined a common carrier in the communications context as an entity which "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 701 n.10 (1979). An essential characteristic of a common carrier is that it "does not make individualized decisions, in particular cases, whether and on what terms to deal." *Id.*

Neither the Supreme Court nor the Ninth Circuit has specifically decided whether Internet service providers (ISP's) such as AOL are to be considered common carriers.[6] In fact, only two courts have addressed the question specifically, and both have concluded that ISPs are not common carriers.

In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361 (N.D.Cal. 1995), the court concluded that an Internet access provider, Netcom, did not fit within the definition of

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[6] The FCC considers AOL to be an ISP. *See, e.g*, Order, 11 FCC Rcd 21354 (1996), at par. 287, n. 3 87, 288. The FCC defines "ISPs" as "information service providers," while Defendants use the industry definition of "Internet service providers." This distinction does not alter the analysis, because the FCC treats Internet service providers as a subset of information service providers. *See, e.g.*, Order, __ FCC Rcd __ 1997 FCC Lexis 2591 (May 16, 1997) at par. 341 & n.498.

common carriers under the Copyright Act, which is analogous to the Communications Act definition.[7] Netcom provided nothing more than Internet access, but the court concluded that Internet access providers were not common carriers because they do "more than just 'provide the wire and conduits' . . . Further, Internet providers are not natural monopolies that are bound to carry all the traffic that one wishes to pass through them, as with the usual common carrier." *Id.* at 1370, n. 12. The court found that Netcom had suspended the accounts of subscribers who violated its terms and conditions, and concluded that Netcom was not a common carrier because common carriers "must not have any direct or indirect control over the context or selection of the primary transmission." *Id.*

The court in *CompuServe, Inc. v. CyberPromotions, Inc.*, 962 F.Supp. 1015 (S.D. Ohio 1997) noted that "Internet service providers have been held not to be common carriers." *Id.* at 1025. Relying partly on Religious Technology Center, the court held that CompuServe, an ISP and one of AOL's competitors, could not be viewed as a public utility, to which the public would have a right to reasonable access, because CompuServe did not provide an "essential good or service to the general public" and did not occupy a

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[7] The Copyright Act's definition of a common carrier is: "[A]ny carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others." 17 U.S.C. § 111(a)(3).

"monopolistic or oligopolistic position in the relevant marketplace." *Id.*

Defendants argue persuasively that, like Netcom and Compuserve, AOL has none of the characteristics of a common carrier. While common carriers act as passive conduits for information, Plaintiffs admit in their Complaint that AOL offers "a broad array of original and derivative programming and content." First Amended Complaint, ¶ 25. Additionally, while common carriers do not make individualized decisions whether and on what terms to deal, Plaintiffs acknowledge that "AOL has filed suit attempting to enjoin private providers of commercial advertising to AOL subscribers through e-mail." First Amended Complaint, ¶ 167. Under the Supreme Court's definition of common carriers, and applying the scant case law on the subject, the Court cannot find that AOL should be considered a common carrier.

2. The FCC has refused to regulate Internet Service Providers as common carriers.

The Court should defer to FCC pronouncements determining the scope of a statute it is charged to administer. See 47 U.S.C. § 151 (creating FCC to administer Communications Act). The Supreme Court has noted that because the term "common carrier" is not well defined in the Communications Act of 1934, "resort must be had to court and agency pronouncements to ascertain the term's meaning." *FCC v. Midwest Video Corp.*, 440 U.S. 689 n. 10 (1979); *see National Assoc. Of Regulatory Utility Comm'rs v. FCC*, 525

F.2d 630 (D.C.Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). The Supreme Court has also "repeatedly emphasized that the [Federal Communications] Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981); *See also Western Union Telegraph Co. v. FCC*, 541 F.2d 346, 351 (3d Cir. 1976) (deferring to FCC expertise in determining controversy involving "complex, sophisticated, and rapidly changing communications technology" and stating that the "Communications Act . . . is agency's expert province").

The FCC has not classified Internet Service Providers as common carriers subject to regulation under Title II of the Communications Act. The commission recently stated: "The definitional sections of [the Telecommunications Act of 1996] make clear that the term 'carriers' is synonymous with the term 'common carriers,' which does not include ISP's." Order, 11 FCC Rcd. 21905 (1997) at par. 267.

The FCC does not consider ISPs, such as AOL, to be common carriers because the FCC classifies ISP's as providers of "enhanced" services. *See* Order, __ FCC Rcd __ 1997 FCC LEXIS 2591 (May 16, 1997) at ¶¶ 341, 344, 345 ("enhanced services" include "access to the Internet and other interactive computer networks."); Order, 12 FCC Rcd. 87 (1996), at ¶ 782 (the FCC has "traditionally defined on-line and Internet services as enhanced services, and has not regulated [enhanced service providers] as common carriers."). Under the FCC's definitional scheme, providers of "enhanced" services are not providers of common carrier services,

and are not regulated under Title II of the Communications Act.[8] *See Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982)

The FCC classifies ISP's as non-common carrier "enhanced" service providers because they engage in information processing functions such as authentication, email storage and retrieval Web page hosting, and domain name server lookups "which involve substantial computer processing and interaction with customer-supplied information." K. Werbach, Digital Tornado: The Internet and Telecommunications Policy, March, 1997, FCC OPP Working Paper No. 29 at p.32-33. *See also* Order, 11 FCC Rcd. 21905, at ¶¶ 341, 343, 344.

The FCC's refusal to classify Internet service providers as "common carriers" stems from a desire to avoid "potentially detrimental effects on growth of the still-evolving information services industry" that would flow from such a classification. Order, __ FCC Rcd __ 1997 FCC Lexis 2591 (May 16, 1997), at ¶¶ 341, 343.

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[8] The FCC distinguishes between "enhanced" and "basic" communications services. Basic services involve only information transport, while enhanced services include performing services on . :he transmitted information and providing stored information to subscribers. See 77 FCC 2d 384 (1980) at par. 86-94.

3. Congress has refused to classify Internet Service Providers as common carriers.

Congress has also refused, in recent legislation, to classify ISPs as common carriers. The Telecommunications Act of 1996 specifically provides that "[n]othing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers." 47 U.S.C. § 223(e)(6). As Defendants point out, such a statement would not be necessary if AOL and other ISP's were already considered common carriers. The 1996 Act sets out the reasons for this policy of restraint: "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

Accordingly, since the courts, the FCC, and Congress have refused to regulate Internet Service Providers as "common carriers" under the Communications Act, this Court must decline to impose such a classification. Plaintiffs' claim for violation of the Communications Act of 1934 must therefore be dismissed.

C. Plaintiffs' Eight and Ninth Cause of Action for Declaratory and Injunctive Relief Do Not Allege Actionable Controversies and Present No Federal Questions

Plaintiffs eighth and ninth causes of action request declaratory and injunctive relief regarding a

variety of issues. The fundamental defect of Plaintiffs' declaratory relief claims is their failure to plead an actionable case or controversy.

Plaintiffs essentially present a laundry list of subjects on which they request judicial determination, without setting out the parties' conflicting positions with sufficient clarity to present an actionable case or controversy. As the Ninth Circuit has stated, "To allege an actual controversy within federal court jurisdiction under the Declaratory Judgment Act, [a plaintiff's] complaint must have alleged facts showing standing and ripeness." *Burlington Northern Railroad Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir 1991). *See also Stephenson v. Stephenson*, 249 F.2d 203, 208 (7th Cir. 1957) (an actual controversy exists "when one side makes a claim of a present, specific right and the other side makes an equally definite claim to the contrary.") Plaintiffs fail to present such a claim.

Moreover, a declaratory or injunctive relief claim cannot serve as an independent basis for federal jurisdiction. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (matter in controversy supporting request for declaratory judgment did not arise under federal law and could not serve as a basis for federal jurisdiction). Because Plaintiffs fail to allege a cognizable basis for declaratory or injunctive relief arising under federal law, Plaintiffs' declaratory and injunctive relief claims fail on this additional ground.

1. Plaintiffs' reliance on purported constitutional issues is unavailing.

Plaintiffs request declaratory relief concerning various acts alleged to impinge on the privacy interests of AOL subscribers. Specifically, Plaintiffs allege that AOL exposes its subscribers to commercial advertising, fails to warn subscribers that third parties may be able to access their computers; and declines to use readily available notices and effective prophylactic options to prevent these actual and potential invasions of privacy.

Plaintiffs' allegations concerning the right to privacy and to Dee speech, brought "under the First, Fourth, Fifth, and Ninth Amendments . . . as well as the Fourteenth Amendment" ignore a well-established prerequisite for any claim under these amendments: state action. The United States Constitution protects individuals only from government action, not private institutions such as AOL. *See New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1358 (2d Cir. 1989).

Moreover, Plaintiffs' assertion that AOL has "assumed an affirmative duty in connection with the privacy expectations of its subscribers" does not establish the state action required to state a claim under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *See Cyber Promotions, Inc. v. America Online, Inc.*, 948 F.Supp. 436, 443-44 (E.D.Pa. 1996) (holding that AOL is a private actor for purposes of First Amendment analysis); *Compuserve, Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015, 1025-26 (S.D. Ohio 1997) (holding that commercial online computer

services are private actors, and not public utilities under Ohio law). Because Plaintiffs' reliance on purported constitutional issues is unavailing, Plaintiffs' claims for declaratory and injunctive relief fail.

2. Plaintiffs fail to raise a valid claim under federal copyright laws.

Finally, Plaintiffs' ninth cause of action requests both declaratory and injunctive relief regarding the parties' standing under federal copyright law. Plaintiffs allege that Defendants assert rights to copyrights and other intellectual property rights from subscribers when they post protected material such as "screen names" on the Internet using Defendants' services.

A claim does not arise under federal copyright laws simply because the copyright may be the subject matter of the controversy. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 826 (2d Cir. 1964), cert denied, 381 U.S. 915 (1965). A case arises under federal copyright laws:

> [I]f and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction, or asserts a claim requiring construction of the Act, or at the very least, and perhaps more doubtful, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.

Id. at 828. Plaintiffs have not alleged an actual or threatened infringement of the Act. Rather, Plaintiffs seek declaratory relief as to whether the submission of materials "to any 'public area' of AOL . . . constitutes transfer of copyright ownership." First Amended Complaint, ¶ 260(3). Whether such submission constitutes such a transfer or not, there is no allegation that any copyright has been, or will be, infringed.

Since none of the claims asserted under Plaintiffs' claims for Injunctive and Declaratory relief presents an actionable controversy within federal jurisdiction, the Eighth and Ninth Causes of Action must be dismissed.

D. Plaintiffs' Fourth. Fifth. Sixth and Seventh Causes of Action Under State Law Must Be Dismissed for Lack of Jurisdiction

Since Plaintiffs' federal claims are dismissed, the state law claims must be dismissed as well. *See Jones v. Community Redev. Agency*, 733 F.2d 646, 651 (9th Cir. 1984) ("When federal claims are dismissed before trial . . . pendent state law claims also should be dismissed."); *see also Religious Technology Center*, 971 F.2d at 367-68 (affirming dismissal of pendent state claims following dismissal of RICO and copyright claims). There is no reason for the court to assert supplemental jurisdiction over Plaintiffs' state law claims. No discovery has been taken; no substantive rulings have been issued on any of the state law claims. The Court therefore declines to exercise supplemental jurisdiction over these claims.

IV. CONCLUSION AND ORDER

In conclusion, Plaintiffs' nine causes of action fail to state a claim upon which relief can be granted for the following reasons:

I. Plaintiffs' First and Second Causes of Action Fail to State a Claim Under Any Section of RICO.

II. Plaintiffs' Third Cause of Action fails because AOL Is Not Classified as a Common Carrier Under the Communications Act.

III. Plaintiffs' Eight and Ninth Cause of Action for Declaratory and Injunctive Relief Do Not Allege Actionable Controversies and Present No Federal Questions.

IV. Plaintiffs' Fourth, Fifth, Sixth and Seventh Causes of Action Under State Law Must Be Dismissed for Lack of Jurisdiction.

Having made its findings of fact and conclusions of law, the Court hereby GRANTS Defendants' motion to dismiss the Amended Complaint in its entirety, with prejudice. Plaintiffs are free to refile these claims in state court.

The Clerk of the Court shall serve a copy of this Decision, and the Judgment to filed and entered hereafter, on all counsel of record.

IT IS SO ORDERED.

DATED: 5/14/98

The Honorable A. Andrew Hauk United States District Judge